

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF OHIO
3 WESTERN DIVISION

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5 JEFFERSON-PILOT LIFE, . CASE NO. 1:02-CV-00479
6 Plaintiff, . STATUS CONFERENCE
7 - v - . Wednesday, October 18, 2006
8 CHRISTOPHER KEARNEY, et al., . 1:30 p.m.
9 Defendant. . Cincinnati, Ohio
10

11 TRANSCRIPT OF PROCEEDINGS
12 BEFORE THE HONORABLE MICHAEL R. BARRETT

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14 Amy Callow, Esq.
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16 For the Defendant,
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20 Courtroom Deputy: Barbara Crum

21 Court Reporter: Maryann T. Maffia, RMR
22 U.S. Potter Stewart Courthouse
23 100 E. Fifth Street
24 Cincinnati, Ohio 45202
25



1 THE COURT: Why don't we just go on the record for a
2 second.

3 We are here on a follow-up of our conversation of
4 last week, I think, relative to the filing of the Motion for
5 Summary Judgment, then the filing of a Motion to Strike the
6 Motion for Summary Judgment, and the Reply thereto. What I'm
7 going to do is, I am going to grant the Motion to Strike the
8 current filing for summary judgment. There is automatic leave
9 given to refile the motion after the completion of discovery.

10 I am going to ask counsel to work on a workable and
11 fairly expedited discovery plan to figure out where they are
12 going to be, and then we will deal with, once that's
13 completed --

14 I don't know how much the facts, Bill, will change
15 where your summary judgment is going to be, but how much time
16 would you need after you guys conclude any discovery? I'm
17 assuming you are going to basically refile the same thing
18 maybe with some excerpts that come out of the depositions, and
19 Mike could probably file his response with other deposition
20 excerpts, I'm thinking.

21 MR. ELLIS: I would suspect that's probably the case,
22 Your Honor. I think the real question is going to be what
23 exactly are -- what are the specifics that Mike is claiming so
24 we have some idea of what might be relevant discovery and what
25 isn't.

1 Right now, we are faced with the outstanding
2 discovery which is for all electronic information, back-up
3 tapes, so forth and so on, that really, as far as I can tell,
4 would be unrelated to any of this unless Mike has some
5 specific claim that he would like to advise us on.

6 THE COURT: Okay. I mean, you are heading, Mike,
7 towards the invasion of privacy and then just the bad faith,
8 the communications between the two companies, or what?

9 MR. ROBERTS: Your Honor, you did read one side's
10 motion.

11 THE COURT: Right.

12 MR. ROBERTS: It's written in a way that, you know,
13 it's meant to persuade and it slants the facts. I think all
14 claims will be gone if we are done with the discovery, but I
15 will write out before Friday what I think to be discovery that
16 needs to be done.

17 THE COURT: Why don't you guys just figure that out?

18 MR. ROBERTS: Judge, do you want us to take discovery
19 disputes up with you directly or go to a specific magistrate
20 first?

21 THE COURT: No, no, just if -- I want you to try to
22 figure out what you want to do, see if you can narrow or
23 tailor your discovery so that it's relevant to fairly what you
24 think will still be alive. Until it's discovered, you know,
25 who knows. But I wanted it to be workable stuff, and I want

1 you guys to try to work on a reasonable timetable and get back
2 to me with the dispute, or we can have another conference in a
3 week or two or whatever.

4 MR. ROBERTS: I don't want you to have to keep
5 visiting with us.

6 THE COURT: I love you guys. What are you talking
7 about?

8 MR. ROBERTS: That's understood. But that would be
9 great if we could just deal with discovery disputes rather
10 than working through the magistrate and deal with --

11 THE COURT: Just deal with it directly. Just call
12 Grace or Barb to set up a conference or a call, and we'll deal
13 with it that way.

14 MR. ROBERTS: Is there a chance we could ballpark a
15 season for a trial, if not a month?

16 THE COURT: Sure. I don't know what -- well, pretty
17 hard to do that unless I have an idea of how long you guys are
18 going to take on discovery.

19 MR. ROBERTS: Assuming everyone is fully cooperative
20 -- me and plaintiff and defendant and third party -- you know,
21 discovery shouldn't linger into 2007. Summary judgment
22 briefing could be January, February, however long you need to
23 decide. I mean, I'd love to be able to tell my client that
24 after four and a half years we are now at a point where we are
25 six months from trial.

1 THE COURT: I don't have a problem giving a trial
2 date. I recognize that part of the situation.

3 Bill, do you have any problem with that? I mean,
4 we're not assuming any outcome, just giving this guy a date.

5 MR. ELLIS: Judge, I'm never opposed to working
6 against an end date. I would like to get the thing resolved
7 and --

8 THE COURT: Okay. And the other thing on the Motion
9 to Strike, I didn't grant it because of all the stuff you said
10 about -- I mean, obviously, the schedule is blown. I think
11 everybody knew that. I'm just doing it so mechanically it
12 works in terms of just keeping the boxes in order. That's
13 all.

14 MR. ELLIS: I understand.

15 THE COURT: What do you got, Barb, something in
16 March, April, May?

17 THE CLERK: In April, we have two full weeks that are
18 open beginning April the 2nd. Actually, the 26th of March
19 through April 13th are completely free. Well, the week of the
20 second on that Friday is Good Friday, so...

21 MR. ROBERTS: Which means spring break is the
22 following week.

23 THE CLERK: Somebody's spring break is -- if you
24 still have kids in elementary school, probably, or middle
25 school, high school.

1 MR. ROBERTS: March 26th?

2 THE CLERK: Yeah.

3 THE COURT: Do you have my time in March blocked off?

4 THE CLERK: Yours is much earlier.

5 THE COURT: It's earlier? Okay.

6 MR. ELLIS: Your kids are on spring break?

7 MS. CALLOW: My kids are on spring break the last
8 week in March and the first week of April, but we're only
9 going to be gone the last week in March. The first week in
10 April is probably when most kids have spring break because I
11 think that's preceding Easter.

12 THE COURT: So the last week in March is out.

13 THE CLERK: April 9th? That whole week is free.

14 MR. ROBERTS: That's mine.

15 THE CLERK: That's yours?

16 MR. ROBERTS: Well, that's my children's opportunity.
17 They need a break. They are in first grade. They need to go
18 on vacation.

19 THE COURT: How about after that?

20 THE CLERK: Well, this case is so old that it really
21 would thump anything else that we have scheduled. So April
22 the 16th would also work. The only bad thing is that
23 beginning on April the 30th, we have a three-week trial in a
24 case that's equally as old as yours, so it wouldn't --

25 THE COURT: Can't we get a VJ? Oh, wrong court.

1 MR. ELLIS: As a thought, Judge, I don't know that
2 this is going to take too terribly long depending upon what's
3 left after the Court rules on summary judgment. Is April 2nd
4 the week that's usable or not usable?

5 MS. CALLOW: It is for me but probably not for Mike.

6 MR. ELLIS: I thought April 9th was yours, Mike?

7 MR. ROBERTS: April 2nd is only a four-day week.

8 The last time we had a trial, Bill, there was a
9 mistrial because it took too long, so I'm reluctant to be
10 conservative and to say we can get it done inside a week.

11 MR. ELLIS: All right. It was just a thought.

12 THE COURT: So where are we then, Barb?

13 THE CLERK: If we did April the 16th, we could
14 maneuver two free weeks there. It's just that the last week
15 of April we start a three-week trial with a case that's as old
16 as yours.

17 MR. ROBERTS: Is there a chance we could start maybe
18 on the 17th, because Monday after --

19 THE CLERK: Being gone?

20 MR. ROBERTS: Yeah.

21 THE COURT: Well, how long do -- well, we don't know
22 how long it's going to take because we don't know what's still
23 outstanding. That gives us how many dates then before the
24 other case?

25 THE CLERK: That would give us four days one week,

1 five days the next week, and then we start the --

2 MR. ELLIS: Nine days.

3 THE COURT: That would be fine.

4 THE CLERK: You want that, April 17th?

5 THE COURT: How does that sound over there?

6 MR. ELLIS: That's fine with me, Judge.

7 The question I would have that is prompted by what
8 you said a moment ago, Judge -- if we are looking at the
9 communications between Jefferson-Pilot and Disability
10 Management Services, the third-party administrator, I would
11 assume that that is in reference to this conspiracy claim.

12 THE COURT: I guess the conspiracy or the alleged bad
13 faith maybe, right, or not?

14 MR. ROBERTS: You know, Rule 26 is pretty clear about
15 the scope of discovery. I -- it's not my intention to take 30
16 depositions. I don't think Bill has ever been in a deposition
17 with me where I've taken more than five hours. I probably
18 take generally two or three. It's not my intention to spend a
19 lot of time, but I want to be limited to Rule 26. I will lay
20 out exactly what I think we require and why I think we require
21 it, and I will do that before Friday.

22 THE COURT: Okay.

23 MR. ELLIS: I think the problem I have with the
24 conspiracy concept is two-fold: One, there has never even
25 been an allegation of any illegal act outside of the

1 conspiracy. There is a required element to support it.

2 More importantly, at least as I understood Mike's
3 argument to the Court, the conspiracy is between
4 Jefferson-Pilot and Disability Management Services colluding
5 so that claims would be either denied or reduced.

6 THE COURT: Right.

7 MR. ELLIS: If, in fact, that's the claim out there
8 in the atmosphere, how does Mr. Kearney have standing to make
9 such a claim if his personal claim was neither reduced nor
10 denied? If the conspiracy is to do one of those two things
11 and neither one affected his claim, where does he have
12 standing to bring suit?

13 THE COURT: Yeah, well, I think as it relates to him,
14 it's probably fair game to look at that kind of
15 correspondence. I don't think you necessarily have to serve
16 up what may be information in some other unrelated lawsuit. I
17 mean, the reason that I don't want to give an answer on that
18 right now is I don't know what's in the correspondence. There
19 may be something in there that lays out a strategy which would
20 indicate bad faith. I don't know.

21 I mean, I tend to agree with you. As Mike pointed
22 out, it's a one-sided look at the law. I tend to agree with
23 you that if the payments were being made, it's pretty tough to
24 make a bad faith claim. On the other hand, there may be some
25 material in there that -- you know, it may relate to some of

1 the other claims, what the detective was doing. I don't know.
2 I can't say.

3 I mean, if there is a gripe, you know, just make a
4 chart and I will take a look at the stuff under seal and we'll
5 go from there. Just make a privilege log or an objection log,
6 for that matter.

7 MR. ELLIS: I understand the Court's -- Rule 26(b)(1)
8 requires that the discovery sought be relevant to some
9 specific claim or defense that's being made. If, in fact --
10 and there is no dispute that Mr. Kearney was not only paid but
11 overpaid continuously, and the only interruption was during
12 the pendency of a lawsuit filed for purposes of having the
13 Court declare the rights and liabilities. And upon the ruling
14 of the Court, he was made whole again and continues to this
15 day to be overpaid.

16 Assume for a moment -- I mean, it's ludicrous, but
17 assume for a moment that there is such a conspiracy between
18 these two companies --

19 THE COURT: Mm-hmm.

20 MR. ELLIS: -- and the purpose of the conspiracy is
21 to adversely affect the claim of -- a legitimate claim of an
22 insured.

23 THE COURT: Mm-hmm.

24 MR. ELLIS: If Mr. Kearney's claim, as everyone
25 recognizes, was not affected by any such plan, then while

1 someone else who may have been affected would have a lawsuit
2 based upon that, Mr. Kearney would not.

3 THE COURT: Well, I mean --

4 MR. ELLIS: He can't sue General Motors, for example,
5 for conspiring with a manufacturer of a tire to put these
6 cheaper tires on their cars that may endanger the drivers of
7 the car if he drives a Ford.

8 THE COURT: Yeah, but it's not the same analogy.
9 There may be things -- and I don't know. I mean, there may
10 have been -- even though the claim was continued to be paid
11 resulting, perhaps, in no damages, there may have been steps
12 taken such as correspondence and things to throw his guy off
13 the trail. I don't know, so we'll take a look at it and see.
14 I don't know what kind of --

15 MR. ELLIS: The claims file containing all the
16 correspondence relating to Mr. Kearney, at least to and from
17 Mr. Kearney, has already been turned over a long time ago.

18 THE COURT: Okay. I mean, I don't know the answer
19 now. So, I mean, when you guys get to the documents you're
20 talking about, I'll take a look at it. We'll do it in camera
21 if we have to. I could see where somebody could advance a
22 theory even though -- I mean, they may have taken steps in
23 furtherance of the attempted bad faith. I don't know if it
24 survives a legal challenge at some point. But right now since
25 the motion has been stricken, for the time being, you know,

1 give him the discovery he is looking for. If you have an
2 objection to it, just log it, I will take a look at it, and
3 we'll go from there.

4 MR. ELLIS: Well, perhaps we can shorten the time at
5 least, and maybe the objections, if Mike can tell us with some
6 specificity what exactly the claim is for each of these four
7 remaining claims so that we know going in whether it makes
8 sense that they have the discovery they seek. Would that be a
9 fair request?

10 THE COURT: Well, I think you guys ought to be able
11 to figure out what you want. On the other hand, you know, I
12 mean, you can throw a fairly large net out with discovery.
13 It's kind of hard for me without having the actual dispute
14 framed up in my head to know exactly what's proper and what's
15 improper.

16 MR. ELLIS: Well, I have the same problem the Court
17 has, which is why I'm asking if Mike could delineate for us
18 the specifics. Or I can give him Interrogatories asking for
19 the specifics of each claim --

20 THE COURT: So, I mean, what are you guys talking
21 about? Are you talking about a claim file? What else?

22 MR. ELLIS: The claim file has already -- he's been
23 in possession for years.

24 THE COURT: Well, what else would there be?

25 MR. ROBERTS: There is depositions that need to be

1 taken, primarily some follow-up that needs to be done since
2 the case has been dormant for a few years. There was some
3 document requests outstanding that were ordered to be complied
4 with back in 2004.

5 THE COURT: So, like what kind of stuff?

6 MR. ROBERTS: Judge, I'd need to revisit it and get
7 that on Friday.

8 THE COURT: All right. Fine.

9 MR. ELLIS: Perhaps we should set a date maybe ten
10 days out, Judge, to maybe at least get a limiting control on
11 the discovery so that we can move this forward without
12 unnecessary delay.

13 THE COURT: Sure. I don't mind coming back in ten
14 days or two weeks and talking to you guys again.

15 MR. ELLIS: That would be great, Judge.

16 THE CLERK: Two weeks is the first of November.

17 THE COURT: What day of the week is that?

18 THE CLERK: It's a Wednesday. It's a good chance
19 that we'll be free that day.

20 MR. ELLIS: You know, I am saying this without
21 looking. I know that I am in mediation in Chicago on the
22 first. I should be back. I have a deposition. I can be back
23 Friday the third without any problem.

24 And so that Mike knows and the Court knows, there is
25 two weeks at the beginning of November from the sixth to

1 whatever two weeks is when I'm out of the game because I've
2 got to serve as a grand juror in Hamilton County. So I will
3 not be able to give any attention to this case, I would
4 assume. I've never been a grand juror before, so I don't know
5 how much time I'll have.

6 THE COURT: Okay. That's pretty close to a
7 seven-hour day, Bill.

8 MR. ELLIS: In which case, I'm going to be out of the
9 game for two weeks.

10 THE COURT: Yeah.

11 MR. ELLIS: So that you understand, Mike, I'm not
12 going to be delaying any response to you, but these two weeks
13 I'm not going to be able to do anything.

14 THE COURT: So, Bill, do I understand you want to try
15 the third or not?

16 MR. ELLIS: The third would be great.

17 THE COURT: What are we doing on the third, Barb?

18 THE CLERK: The third is good. You want to do it in
19 the morning?

20 THE COURT: Don't we have a criminal trial that's
21 going that week or not?

22 THE CLERK: Well, it's questionable now.

23 THE COURT: Without saying which one it is, without
24 saying the names, the multi -- is it the robberies?

25 THE CLERK: Yeah.

1 THE COURT: Oh, okay. You got more faith than I do.

2 THE CLERK: No, wait, wait. No, it's Richard's case.

3 THE COURT: Okay.

4 MR. ELLIS: I can be available any time that day that
5 the Court wants.

6 THE COURT: What do you guys want to do?

7 MR. ROBERTS: Want to get that done before you get
8 started in any trial you may have?

9 THE COURT: Want to do it in the morning then?

10 THE CLERK: Yeah. We can do it like at nine.

11 THE COURT: Sure, that's great.

12 MR. ELLIS: That would be fine.

13 THE COURT: And I'm not going -- Barb, is what I said
14 on the record sufficient for a journal entry on the Motion to
15 Strike and what's going on?

16 THE CLERK: Mm-hmm, right. And do you want to set a
17 final pretrial date too along with that trial date?

18 THE COURT: Well, why don't you guys -- might as well
19 do it here since everybody is here rather than back it up and
20 see if there's problems. So what, go 30 days back?

21 THE CLERK: I was looking at the 16th of March, which
22 is a Friday. That looks really good because that other case I
23 talked about, their final pretrial is that day too.

24 THE COURT: Okay.

25 THE CLERK: So that would be good. So 10:30 on --

1 THE COURT: Yeah, but those guys get along. Just
2 kidding.

3 THE CLERK: So 10:30 on the 16th of March.

4 MR. ELLIS: Final pretrial?

5 THE CLERK: For a final pretrial.

6 THE COURT: What time's the other one?

7 THE CLERK: The other one is at 9:30, so that works
8 good.

9 THE COURT: That's fine. Is there anything else?

10 MR. ROBERTS: See you Friday the third.

11 THE COURT: See you in a couple of weeks.

12 MR. ROBERTS: Thank you, Judge.

13 MR. ELLIS: Thank you very much, Your Honor.

14 THE COURT: Okay, thanks.

15

16 (The proceedings concluded at 1:55 p.m.)

17

18 C E R T I F I C A T E

19

20 I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM
21 THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

22

23

Maryann T. Maffia
MARYANN T. MAFFIA, RMR
Official Court Reporter

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10/27/06